IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,755

EDUCATION DEVELOPMENT CENTER, INC.,

Petitioner,

vs.

CITY OF WEST PALM BEACH ZONING BOARD OF APPEALS, et al.,

Respondents.

_____/

BRIEF OF RESPONDENTS

Carl V.M. Coffin, Esquire
City of West Palm Beach
P.O. Box 3366-200 2nd St.
West Palm Beach, FL 33402
(407) 659-8017
Florida Bar No. 122723

COUNSEL FOR RESPONDENTS

TABLE OF CONTENTS

AUTHORITIES CITED

STATEMENT OF THE CASE

Petitioner, EDUCATION DEVELOPMENT CENTER, INC., is the owner of real property located at 2300 Parker Avenue, West Palm Beach, Florida. Petitioner filed a petition with the West Palm Beach Zoning Board of Appeals (Board) on September 5, 1984, to operate a school at that location. The Board had jurisdiction to hear the matter by virtue of Sec. 53-6.1.d. of the West Palm Beach zoning ordinance, which provided:

> Sec. 53-6. "R-1" Single-Family Residential District Regulations.
>
> * * * * *
>
> 1. Use Regulations - A building or premises shall be used only for the following purposes:
>
> * * * * *
>
> d. Public schools or private schools having a curriculum corresponding to that offered in comparable public schools having no rooms regularly used for housing or sleeping purposes of the students provided that before any building occupied by a private school, the applicant shall be required to appear before the Zoning Board of Appeals and prove, by substantially competent evidence, that the proposed occupancy will be by a school offering a curriculum substantially similar to that offered in comparable public schools.

On November 1, 1984, the matter was heard. The Board denied the petition.

Petitioner's Amended Petition for Writ of Certiorari was filed in the circuit court on December 3, 1984. The circuit court reversed the decision of the Board in its OPINION entered February 28, 1986:

> "There was substantially competent evidence that the curriculum which the Petitioner was going to use in the operation of its pre-school was substantially similar to that offered in comparable public schools..."

The trial court did not examine the record to decide whether there was competent substantial evidence to support the decision of the Board.

Consequently, the Board petitioned the Fourth District Court of Appeal for a Writ of Certiorari on March 31, 1986, arguing that the trial court failed to apply the proper standard for review in its OPINION. The Fourth DCA granted the petition, quashed the order of the circuit court and remanded with instructions that a redetermination be made applying the correct standard of review. City of West Palm Beach Zoning Board of Appeals v. Education Development Center, Inc., 504 So.2d 1385 (Fla.App. 4th DCA 1987).

On remand the circuit court scheduled additional oral argument of counsel and thereafter entered a second OPINION on October 7, 1987. This OPINION is identical to the OPINION of February 28, 1986, which had been reversed, with one exception. The court inserted a single additional sentence:

> "Likewise, there was not substantial competent evidence to support the CITY's denial of the petition."

In all other respects, the two opinions are the same.

The Board petitioned the Fourth DCA a second time for a Writ of Certiorari on November 6, 1987, arguing that the trial court again did not apply the correct law. Specifically, the trial court substituted its judgment for that of the Board and re-weighed the evidence reaching a contrary conclusion. The Fourth DCA agreed in City of West Palm Beach Zoning Board of Appeals v. Education Development Center, Inc., 526 So.2d 775 (Fla.App. 4th DCA 1988) and reversed the trial court finding that there was competent substantial evidence in the record to support the Board's decision.

Petitioner now seeks to have the Fourth DCA reversed and the second opinion of the trial court reinstated.

STATEMENT OF THE FACTS

At the November 1, 1984 meeting of the Zoning Board of Appeals, Petitioner's application was heard. At the conclusion of the presentation by all interested parties, Board member John Randolph stated the question:

> "What we are dealing with is whether or not this proposed use may be a permitted use under this category if it is interpreted to be a private school rather than a day-care center; and if that is indeed the appropriate interpretation, whether or not the curriculum is comparable to other public schools" (T 73).

Board member Randolph then moved to deny the application saying:

> "I don't believe that I have seen come before us today, Mr. Chairman, evidence, substantially competent evidence, which convinces me that the curriculum proposed in this school is comparable to the public school system" (T 74).

The motion was unanimously adopted by the Board.

Having the burden of proof, the Petitioner began the hearing by offering into evidence "Applicant's Exhibit Number 1," a "handbook" entitled "The Florida Migratory Child Compensatory Program" (T 11). This handbook was described by Petitioner as "the curriculum that we anticipate using" (T 11) to provide pre-school services to thirty-eight (38) three year olds and fifteen (15) four and five year olds (T 35).

Petitioner then called Palm Beach County school employee, Betty Bell, a director of elementary education, who testified

that the Palm Beach County School Department of Federal Programs supervises a federally funded grant program for pre-school children of migrant workers (T 28). While "our public education program begins when children enter kindergarten which is at the age of five" (T 26), this migrant program is an optional opportunity limited only to those pre-school aged children of persons who qualify as migrant workers (T 27). The children of persons who do not so qualify are not eligible (T 28).

Bell testified that Palm Beach County offers no open admission to any pre-school program or facility (T 26). The public education program begins when children enter kindergarten at the age of 5 years (T 26).

After examining the "handbook," Bell stated that it appeared to have been approved by the State of Florida "for three to four to five-year olds in migratory education programs" (T 20). She did not know whether the "handbook" was actually used in any Palm Beach County programs (T 22). Petitioner's attorney, James K. Green, repeatedly asked whether the "handbook" appeared to be substantially similar to the curriculum offered in any public school program. Bell refused to give her opinion (T 23), but finally, when the question was qualified "based upon what you have heard by subordinates," she answered "yes" (T 24).

The other principal witness at the hearing was City Deputy Planning Director William Smith who evaluated the application and recommended that it be denied:

> "It is a use that should be considered as a child-care center, as a day-care center, and

> should only be permitted as a special exception approval in the R-4 or R-5 district whereas as a special exception approval in the R-2 or R-3 district as long as they are affiliated with church and school" (T 48-49).

Smith advised the Board as to the intent of the zoning code:

> "It will allow a kindergarten because we see a kindergarten as part of a certified curriculum of a public school. When we get into the area of pre-school, then we feel this falls within the definition which is currently in the code as far as a child-care center or day-care center" (T 40-41).

Deputy Director Smith had investigated the curriculum matter by contacting local school board officials. "There is no pre-school curriculum that is available," he stated.

> "In our research we could not find from the school system that there exists a pre-school curriculum. They have a curriculum which is for K through five for elementary schools" (T 40).

He concluded that proposed use was not a "private school" (T 50-51 and 65).

A letter from Dr. Joseph A. Orr, Associate Superintendent, Instruction, of October 19, 1984 to the Chairman of the Board, John Randolph, Esquire, confirmed the findings of Deputy Planning Director Smith:

> "The School Board of Palm Beach County has approved curriculum for students from the grade level of kindergarten through grade twelve. We do not have any approved curriculum for children at nursery school level or below" (T 70).

This letter was admitted as "City's Exhibit Number 2."

Anna Rais testified in support of the application:

> "The two principals of these organizations are the director and head teacher of a day-care center that was recently visited by the governor of the State of Florida and cited in different newspapers as an example of quality day-care" (T 55).
>
> * * *
>
> "I will encourage you to visit the Hispanic Human Resources Day-Care Center and you will see the kind of work that these two people are doing there" (T 56).

The delivery and pick up of children at a day-care center will not cause a traffic problem, she said, because unlike schools day-care centers have flexible, not "mandatory," attendance periods (T 56).

"Petitioner's Exhibit Number 4" admitted in evidence was a letter of October 11, 1984 from State Representative Ed Healey to the Petitioner regarding the Hispanic Resource Child Care Center:

> "The Governor and I both highly compliment the fine Hispanic Resource Child Care Center and the wonderful lunch so nicely prepared" (T 61).

A resident in the vicinity of the proposed use, Doris Johnson, stated:

> "From what I have heard today with children three years old and the bulk of them being three, it seems like this does sound like a day-care center and, therefore, it should not even be on this kind of application" (T 57).

POINT ON APPEAL

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY REVERSED THE CIRCUIT COURT WHICH HAD RE-WEIGHED THE EVIDENCE IN CERTIORARI REVIEW AND HAD REVERSED A DECISION OF THE WEST PALM BEACH ZONING BOARD OF APPEALS WHICH WAS BASED UPON COMPETENT SUBSTANTIAL EVIDENCE.

SUMMARY OF THE ARGUMENT

The decision of the Zoning Board of Appeals was reasonable both in light of the evidence and in light of the language of the zoning ordinance being applied. The Fourth DCA properly reversed the circuit court which had substituted its judgment for that of the Board. In so doing the circuit court did not apply the correct law.

The circuit court decided that the greater weight of the evidence supported the Petitioner and disregarded its function of evaluating the record to determine whether the Board's ruling is supported by competent substantial evidence. The second OPINION with the addition of the "magic words" does not mask the flaw. When the pyramidal chain of certiorari review is broken in this way, only the DCA can restore the parties under the law.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY REVERSED THE CIRCUIT COURT WHICH HAD RE-WEIGHED THE EVIDENCE IN CERTIORARI REVIEW AND HAD REVERSED A DECISION OF THE WEST PALM BEACH ZONING BOARD OF APPEALS WHICH WAS BASED UPON COMPETENT SUBSTANTIAL EVIDENCE.

The exercise of a quasi-judicial administrative agency in evidence gathering and decision making, and the review of this record by the judiciary, can be likened to a contest between "pro" and "con" sides where each side independently stacks evidentiary poker chips seeking to reach a height of "competent" and "substantial." While either side may try to remove chips from the other's stack by, for example, challenging credibility, each will primarily endeavor to build the highest stack and win by the greater weight of the evidence before the agency. On certiorari review, the declared winner will be confirmed if his stack reaches or exceeds the level of competent and substantial, even if the circuit court believes the other stack is higher.

As primarily a trial court, a circuit court will occasionally be tempted to re-weigh the evidence - to consider the comparative heights of the chips - rather than contenting itself with the task of deciding whether the prevailing stack meets or exceeds the level of competent and substantial. Whether a circuit court re-weighs the evidence or correctly applies the "competent

substantial evidence" test can only be determined by evaluating written decision of the circuit court in light of the record.

In deciding City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982), this Court held that where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. Regarding the evidence the circuit court is not empowered to disapprove the findings of the administrative agency unless the record made before the agency is devoid of substantial competent evidence to support the agency's decision. Skaggs-Albertson's v. ABC Liquors, Inc., 363 So.2d 1082 (Fla. 1978).

The term "competent substantial evidence" has been judicially defined by this Court in DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957). Regarding "substantial evidence" the Court said:

> "We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." DeGroot, at 916.

Regarding "competent evidence" the Court said:

> "We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot, at 916.

The "competent substantial evidence" test is the judicial test to be employed in the review of quasi-judicial agency decisions reviewable by certiorari.

Where there is competent substantial evidence in the record to support the decision of the agency, it is fundamental error for the circuit court to reverse the decision upon certiorari review. Bell v. City of Sarasota, 371 So.2d 525 (Fla. 2nd DCA 1979). Stated another way, where there is a legitimate controversy before the administrative agency, the circuit court should uphold the agency's decision. Sarasota County v. Purser, 476 So.2d 1359 (Fla. 2nd DCA 1985). In any event, the circuit court is not permitted to re-weigh the evidence contained in the record made before the review agency and substitute its own judgment.

In PETITIONER'S INITIAL BRIEF ON THE MERITS, pages 5 and 6. Petitioner agrees that whether the circuit court applied the correct law "depends on whether it based its reversal of the Zoning Board on its finding the administrative record 'devoid of substantial competent evidence'." Otherwise the circuit court's reversal means it re-evaluated the evidence and substituted its judgment for that of the Board. Petitioner is not correct, however, that the second OPINION of the circuit court in the present case reflects the court's "understanding and application of the correct law."

The Fourth DCA reminded the circuit court in the first appeal, City of West Palm Beach Zoning Board of Appeals v. Education Development Center, Inc., 504 So.2d 1385 (Fla. 4th

DCA 1987), that whether the record contains competent substantial evidence to support a position "contrary to that reached by the agency" is irrelevant. Rather, the judicial question is whether the record contains competent substantial evidence to support the decision. Thus reminded, the circuit court bothered to add:

> "Likewise, there was not substantial competent evidence to support the City's denial of the petition." OPINION, page 4.

The Fourth DCA was obviously not persuaded that the error had been cured. The approach and analysis of the circuit court remained the same.

The second OPINION references only the evidence most favorable to the Petitioner, the stack of chips on the "pro" side, and ignores, save a fleeting reference to the letter of Joseph A. Orr, the evidence on the "con" side. Not mentioned by the circuit court was the testimony of Deputy Planning Director William Smith regarding the meaning of the term "private school" and his description of the purpose of this particular zoning regulation, the evidence indicating the proposed use was a day-care center and not a school, the meaning of the term "curriculum" and whether it means a single "handbook," and whether a nursery school or pre-school is appropriately considered to be a "school." These poker chips, including the actual lack of a pre-school "curriculum" as indicated by Smith's research and by the letter of Orr, comprise the competent substantial evidence in the record to support the Board's denial.

Illustrative of the judicial pyramid of certiorari review is the record in Skaggs-Albertson's v. ABC Liquors, Inc., 363 So.2d 1082 (Fla. 1978). At issue here was the appropriate measurement technique to apply a zoning ordinance regulation requiring a 5,000 foot separation between liquor stores. The circuit court reversed the decision of the Board of County Commissioners which denied zoning approval, determining that the proper method of measurement was that suggested by the applicant. The Fourth DCA reversed the circuit court deciding that the interpretation of the zoning ordinance by the County Commission was correct. ABC Liquors, Inc., v. Skaggs-Albertson's, 349 So.2d 657 (Fla. 4th DCA 1977). The circuit court had applied "a literal interpretation of the zoning ordinance while disregarding the logical." Skaggs, 349 So.2d 657, 660.

This Court upheld the reasoning of the DCA:

> "We find that the conflicting interpretations urged by petitioner and respondents are both reasonable and, consequently, find that the Board of County Commissioners acting in accordance with the essential requirements of law in reaching its decision. The circuit court, therefore, transcended the scope of its certiorari review by substituting its judgment that of the local zoning authority. Because zoning or rezoning is the function of the appropriate zoning authority and not the courts, the circuit court was not empowered to disapprove the finding of the Board unless the record was devoid of substantial competent evidence to support the Board's decision." Skaggs, 363 So.2d 1082, 1091.

Because the decision of the Board was reasonable and was not devoid of supporting substantial competent evidence, the circuit court was bound to uphold it.

Is this record made before the West Palm Beach Zoning Board of Appeals devoid of competent substantial evidence to support the Board's denial of petitioner's application for a private school? Only upon this basis could the circuit court reverse the agency's quasi-judicial decision.

Certainly the decision of the Board is not contrary to the holding in Rivkind v. State ex rel. Gibson, 32 So.2d 330 (Fla. 1947). Here the plaintiff had been denied a municipal occupational license because his proposed location of a liquor store was "nearer than one thousand feet to any school." "School" was apparently not defined in the applicable zoning ordinance. This Court held "that a kindergarten nursery is not a school within the intent of the ordinance." Rivkind, at 331.

In the present case Petitioner sought to convince the Board that its pre-school program, primarily for 3 year olds, would constitute a "private school" within the meaning of the West Palm Beach zoning ordinance. As evidence of the program's school nature, the "handbook" was offered in evidence as a "curriculum", coupled with the testimony of a public school employee who haltingly identified it as a textbook approved by the State of Florida for use in the federally grant funded migratory children program.

This program is statutorily described at Sec. 228.062, Florida Statutes:

> "The Commissioner of Education shall recommend, and the State Board of Education shall prescribe, such rules as are necessary to provide for the participation of the state in the federal migratory child compensatory education program, which may be funded from federal or other lawful sources. The Department of Education is authorized to plan, fund, and administer educational programs for migrant children in the state, beginning for such children at age 3. Such programs shall be operated through grants to local school districts or through contract with other public agencies or nonprofit corporations."

Petitioner did not relate to the Board the nature of Petitioner's relationship with the Palm Beach County School Board. Presumably, Petitioner would enter into a contract with the School Board to provide this service under the federal program and to secure the federal funding.

Chapter 228, Florida Statutes, entitled "PUBLIC EDUCATION: GENERAL PROVISIONS," defines "SCHOOL" at section 228.041(5):

> "A school is an organization of pupils for instructional purposes on an elementary, secondary, or other public school level, approved under regulations of the state board."

Section 228.051, Florida Statutes provides:

> "The public schools of the state shall provide 13 consecutive years of instruction, beginning with kindergarten, and it also provide such instruction for exceptional children as may be required by law."

If the terms "school" and "curriculum," undefined in the zoning

ordinance, are interpreted in light of these statutes, there is no "comparable public school" whereby a comparison of curricula can even be made.

The word "curriculum," in particular, is defined in The American College Dictionary, Random House, Inc., New York, N.Y., 1964, as "the aggregate courses of study given in a school." Indeed, the commonly accepted use of the word is the variety of subjects available at a particular school or learning institution. Black's Law Dictionary, Fifth Edition, West Publishing Co., St. Paul, MN, 1975 says the "set of studies or courses for a particular period, designated by a school or branch of a school." The term "curriculum" is not synonymous with "textbook." Petitioner's proposed curriculum, then, consists of a single "course" for pre-school children for which there is no counterpart in "comparable public schools."

The application by the Zoning Board of Appeals of the zoning ordinance, and the decision of the Board denying the application, are both reasonable and supported by competent substantial evidence in the factual record. The decision of the Board should have been upheld by the circuit court.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy hereof has been furnished by United States mail this 14th day of December, 1988, to James K. Green, Esquire, 301 Clematis Street, Suite 200, West Palm Beach, Florida 33401.

Carl V.M. Coffin

Carl V.M. Coffin
City Attorney
City of West Palm Beach
P.O. Box 3366-200 2nd St.
West Palm Beach, FL 33402
(407) 659-8017